

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>TERRY L. STORY</b>	)	
Claimant	)	
VS.	)	
	)	
<b>ARAMARK UNIFORM SERVICES</b>	)	Docket Nos. 1,007,154;
Respondent	)	1,009,807
AND	)	
	)	
<b>LUMBERMENS MUTUAL CASUALTY COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant appealed the October 20, 2003 Award entered by Administrative Law Judge (ALJ) Jon L. Frobish. The Appeals Board (Board) heard oral argument on March 16, 2004.

**APPEARANCES**

Scott J. Mann of Hutchinson, Kansas, appeared for claimant. Vincent A. Burnett of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

**RECORD AND STIPULATIONS**

The Board considered the record and adopts the stipulations listed in the Award. In addition, the record includes the Stipulation to Medical Records filed April 28, 2003. Also, the parties acknowledged that claimant's claim in Docket No. 1,009,807 should be dismissed.<sup>1</sup>

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<sup>1</sup> R.H. Trans. at 4.

**ISSUES**

The ALJ found claimant suffered two separate and distinct work-related accidents followed by a separate non work-related accident. The ALJ further found that claimant's injury and impairment is attributable to the "superceding intervening event and the [c]laimant is not entitled to compensation under the Workers Compensation Act." <sup>2</sup> The ALJ further determined that "[i]n light of the above findings and conclusion of law, all other issues in this matter are moot."<sup>3</sup> Accordingly, the ALJ did not reach the remaining issues, including:

1. Whether claimant provided the employer written claim pursuant to K.S.A. 44-520a;
2. Whether claimant is entitled to reimbursement of his out-of-pocket medical expenses;
3. Whether claimant is entitled to temporary total disability compensation; and
4. The nature and extent of claimant's disability.

The ALJ did determine, however, that claimant suffered two separate and distinct work-related accidents in February 2002 rather than a series of traumas "each and every working day through April 5, 2002[.]" <sup>4</sup> as alleged by claimant. The ALJ also found that claimant gave timely notice of both work-related accidents. During oral argument to the Board, the parties agreed that in the event the Board finds this claim compensable, the Board should decide all issues including those not decided by the ALJ.

**FINDINGS OF FACTS AND CONCLUSIONS OF LAW**

After reviewing the entire record and considering the briefs and arguments of the parties, the Board finds and concludes:

The Board agrees with the ALJ's findings of fact, including that claimant suffered two work-related accidents. The Board disagrees, however, that the April 6, 2002 incident where claimant sneezed constituted a new, separate and distinct accident and injury. Rather, the Board finds that the April 6 incident was a direct, natural and probable consequence of the work-related accidents and in particular the claimant's February 8,

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<sup>2</sup> Award at 4.

<sup>3</sup> *Id.* at 4.

<sup>4</sup> K-WC E-1 Application for Hearing (filed Oct. 30, 2002).

2002 slip and fall.<sup>5</sup> In so finding, the Board relies primarily on the testimony of claimant and the expert medical opinion testimony of Dr. Paul Stein whose opinions the Board finds more credible than those of Dr. John McMaster. The Board finds Dr. Stein more credible in part based upon his training and his long experience treating backs. Furthermore, Dr. Stein is board certified in neurosurgery whereas Dr. McMaster is board certified in family practice, emergency medicine and undersea hyperbaric medicine. Dr. McMaster is not a surgeon and the treatment of back injuries comprises only a small percentage of his medical practice. Furthermore, the Board is not persuaded that Dr. Stein's opinions lacked foundation or were compromised by an inadequate history. The history he was given was consistent with claimant's regular hearing testimony. Moreover, Dr. Stein did not change his opinion on cross examination.

Dr. Stein rates claimant's functional impairment as 20 percent to the body as a whole based upon the AMA Guides.<sup>6</sup> The Board agrees with and adopts Dr. Stein's rating as claimant's percentage of impairment on a functional basis. In addition, Dr. Stein places permanent work restrictions on claimant including that he avoid repetitive bending and twisting, lifting over 50 pounds more than occasionally, that he be allowed to occasionally sit and stand and alternate those activities and further found that claimant's foot drop condition may affect his ability to operate a vehicle with a manual shift transmission. After reviewing a list of claimant's relevant work tasks during the 15 years period preceding his injury, Dr. Stein opined that claimant could no longer perform 12 out of the 18 job tasks for a 66.67 percent task loss. The Board adopts Dr. Stein's opinion and finds claimant's task loss is 66.67 percent.

Claimant is unemployed and therefore his actual wage loss is 100 percent. However, claimant is unemployed because he voluntarily quit a job with respondent which he had the ability to perform. In so doing, claimant failed to make a good faith effort to retain appropriate employment.<sup>7</sup> Therefore, the wage claimant was earning with respondent at the time he quit will be imputed to him. Nevertheless, as that wage was less than 90 percent of the gross average weekly wage claimant was earning at the time of his injury, claimant is still entitled to permanent partial disability compensation based upon a work disability.<sup>8</sup> Claimant's stipulated average weekly wage was \$782.84. When claimant returned to work for respondent following his back surgery, he did not return to his former job as a route sales representative but was instead given a job as a laborer in the production area. As a result, his pay was reduced to \$8.67 per hour. This resulted in a

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<sup>5</sup> See *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997); *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

<sup>6</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4<sup>th</sup> ed.).

<sup>7</sup> *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

<sup>8</sup> K.S.A. 44-510e(a).

55.7 percent wage loss. Averaging the 66.67 percent task loss with a 55.7 percent wage loss results in a 61.19 percent work disability.

Respondent disputes that claimant made timely written claim.<sup>9</sup> It is undisputed that claimant gave timely notice of his February 8, 2002, slip and fall accident. The respondent prepared an incident report that same day.<sup>10</sup> K.S.A. 44-557(a) mandates that an employer file with the Division of Workers Compensation a report of any accident "if the personal injuries which are sustained by such accidents, are sufficient wholly or partially to incapacitate the person injured from labor or service for more than the remainder of the day, shift or turn on which such injuries were sustained." As a direct and natural consequence of claimant's injury he was hospitalized and underwent back surgery. Respondent failed to make a report of the accident and, therefore, claimant's time for making written claim was extended to one year.<sup>11</sup> Claimant served written claim upon the respondent within one year of his accident. Therefore, his written claim was timely made.

Subject to the fee schedule, claimant is entitled to payment or reimbursement of his related medical treatment and out of pocket expenses.<sup>12</sup>

Claimant was off work due to his injury beginning April 8, 2002, and was not released to return to work until October 6, 2002. Accordingly, claimant is entitled to temporary total disability compensation for this 26 week period.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that Docket No. 1,009,807 is dismissed and the Award entered by Administrative Law Judge Jon L. Frobish dated October 20, 2003 in Docket No. 1,007,154 is modified as follows:

The claimant is entitled to 26 weeks of temporary total disability compensation at the rate of \$417 per week or \$10,842 followed by permanent partial disability compensation at the rate of \$417 per week not to exceed \$100,000 for a 61.19 percent work disability.

As of March 22, 2004, there would be due and owing to the claimant 26 weeks of temporary total disability compensation at the rate of \$417 per week in the sum of \$10,842 plus 76 weeks of permanent partial disability compensation at the rate of \$417 per week in the sum of \$31,692 for a total due and owing of \$42,534, which is ordered paid in one lump sum less amount previously paid. Thereafter, the remaining balance in the amount

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<sup>9</sup> K.S.A. 44-520a(a).

<sup>10</sup> Huxman Depo. Ex. 1.

<sup>11</sup> K.S.A. 44-557(c); *See Childress v. Childress Painting Co.*, 226 Kan. 251, 597 P.2d 637 (1979).

<sup>12</sup> K.S.A. 44-510i.

of \$57,466 shall be paid at the rate of \$417 per week until fully paid or until further order from the Director.

Claimant's contract with his attorney is approved as provided by K.S.A. 44-536.

Future medical benefits may be awarded upon proper application to and approval by the Director.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant  
Vincent A. Burnett, Attorney for Respondent and Insurance Carrier  
Jon L. Frobish, Administrative Law Judge  
Paula Greathouse, Workers Compensation Director